Tang Kheng Teong v Public Prosecutor

COURT OF APPEAL (KUALA LUMPUR) — CRIMINAL APPEAL NO P-05-21 OF 1999
GOPAL SRI RAM, ABDUL HAMID MOHAMAD AND ALAUDDIN JJCA
5 MAY 2003

Criminal Procedure *— Appeal — Conviction and sentence, against — Appellant convicted of trafficking in dangerous drugs — Finding of fact by trial judge that appellant's statement did not raise reasonable doubt — Trial judge made finding that appellant had in his custody and under his control the basin which contained heroin and that he knew that it was heroin — Whether trial judge was wrong*

Criminal Procedure *— Appeal — Conviction and sentence, against — Appellant convicted of trafficking in dangerous drugs — Appellant's defence was that heroin belonged to Choong — Trial judge found that Choong was not fictitious character — Whether trial judge had failed to make a finding of fact as to whether Choong was actual trafficker — Whether trial judge right in not making finding as to whether Choong was an actual trafficker*

On 30 June 1990, Insp Perumal a/l Alagan, acting on information received, led a party of police officers in a raid upon an apartment in Penang ('the said apartment'). When the police party arrived at the entrance to the apartment, Insp Perumal found the outer metal grilled door to the apartment closed but not locked. However, the wooden door was locked. He thereupon rapped on the wooden door and shouted repeatedly, 'Polis! Polis! Buka pintu!' but no one opened the door. Suddenly, he heard the sound of things being moved inside the apartment whereupon he managed to kick open a hole in the door and gain entry into the apartment by reaching through the hole and unlocking the door from inside. Insp Perumal and the police party then rushed into the apartment and saw two male Chinese standing there, the first accused ('the appellant') in the living area and his younger brother ('the second accused') in the kitchen area. Both the accused were clad only in their underwear. He noticed white powder and orange colouring on the tips of their fingers and on their feet. They looked shocked and pale. Two basins containing orange-coloured powder were found in the kitchen. Another basin containing orange-coloured powder was on a lighted gas stove in the balcony. After identifying himself as a police officer to the two accused persons and informing them that he was arresting them on suspicion of processing drugs, Insp Perumal and the police party carried cut a search of the apartment. Upon interrogation and prior to the search, the appellant led Insp Perumal to the only toilet in the apartment where he pointed to the water tank in the toilet. Insp Perumal saw a plastic bag protruding over the top of the tank. He took down the plastic bag and found four compressed blocks of a white substance inside. A further search resulted in the recovery of three packets of suspected heroin kept in a pail in the third room of the apartment. Insp Perumal also recovered from a drawer of an altar in the living area

six small packets of suspected heroin inside another plastic bag. The contents of the three basins, the plastic bag recovered from on top of the water tank and the other packets seized were, upon analysis, found to contain heroin. Swabs taken of the hands and feet of the two accused persons also revealed, upon analysis, traces of heroin. Traces of heroin were also found on their underwear. Samples of powder gathered from the floor of the kitchen and the balcony also showed the presence of heroin and caffeine. The heroin found in the apartment weighed 1,689.68g. The appellant was charged with the second accused under s 39B(l)(a) and punishable under s 39B(2) of the Dangerous Drugs Act 1952 ('the Act'). At the close of the prosecution's case, the learned trial judge amended the charge to one under ss 12(2) and (3) and punishable under s 39A(2) of the Act. Both of them pleaded guilty. The appellant was convicted and sentenced to 12 years' imprisonment and ten strokes of the rotan. The second accused was sentenced to nine years' imprisonment and ten strokes of the rotan. The Public Prosecutor appealed against those decisions ('the first appeal'). The Court of Appeal allowed the first appeal and directed that both the accused be called upon to enter upon their defence on the original amended charge. Both the accused appealed to the Federal Court. The Federal Court dismissed their appeals. Subsequently, the learned trial judge continued the trial and heard the defence of both the accused. In his defence at the continued trial, the appellant gave an unsworn statement from the dock which was put in writing. It was the appellant's contention that he had gone to the said apartment to collect overdue instalments on an illegal money lending transaction at the behest of his employer, one Tan Bak Huat ('Tan'). In September 1989, Tan had made a loan RM20,000 to one Choong Hock Chuan ('Choong'). On the 30 June 1990 at about 4.30pm, the appellant went to the said apartment to collect the debt due from Choong. According to the appellant, when he arrived at the said apartment at about 5.30pm, he found the door locked and the windows closed. He called out Choong's name a few times but there was no reply. He then used his duplicate set of keys to unlock the door and found Choong in the living area of the apartment. The appellant then asked Choong about his debt to Tan and Choong told him that he could only repay a part of it. Choong also told the appellant that he would only go downstairs to collect the balance of the money and told him to wait in the said apartment. The appellant told Choong that he would keep Choong's keys to the apartment until his return and if he failed to make repayment, the appellant would then surrender the keys to the owner of the apartment. Before leaving, Choong told him that there was a pot in the kitchen on the stove and asked the appellant to help stir the contents until he returned. The appellant agreed. About ten minutes later, the appellant removed his clothing and kept them in the second room because he felt sticky and hot. Shortly thereafter, the second accused came to the said apartment and told him to return home as their father was ill. The appellant told

the second accused to wait awhile as he was waiting for Choong to bring money which was owed. As it was very hot inside the apartment, the second accused also took off his shirt and placed it in the living area and went into the kitchen to be with the appellant. After a few minutes, the appellant excused himself to go to the toilet and asked the second accused to stir the contents of the basin with the wooden spoon that he had used. On returning from the toilet, the appellant took over the stirring of the contents of the basin from the second accused. Not long thereafter, the appellant heard loud knocking at the font door. As he was heading towards the door to open it, he found it being broken and a hand being inserted to unlock it. At the time when the police entered the apartment he was in the living area while the second accused was in the area of the kitchen. The appellant denied having pointed out anything to the police and stated that the things that were found in the bathroom were discovered by the police on their own. The appellant stated that he had no knowledge of the things found in the apartment and that he was never involved in any activity pertaining to dangerous drugs or trafficking in them. The learned trial judge concluded that the appellant's statement from the dock had not succeeded in raising any reasonable doubt in the prosecution's case. The learned trial judge stated that the appellant might have been in cahoots with Choong in trafficking in the heroin found in the apartment but that did not detract from his guilt or absolve him from liability. The trial judge found that the appellant did have in his custody and under his control the basin which contained the heroin being cooked and that he knew that it was heroin and that it was only reasonable to conclude that he also had knowledge of and custody and control over the rest of the heroin found in the apartment because of his familiarity with the apartment to the extent of stripping himself to his underwear in order to be comfortable. As such, the trial judge ruled that the appellant was deemed to have been in possession of the entire heroin found in the apartment. Accordingly, the learned judge acquitted and discharged the second accused but found the appellant guilty of the original amended charged and sentenced him to death. This was the appeal by the appellant against his conviction.

Held, dismissing the appellant's appeal and confirming the conviction and sentence:

(1) The argument raised by the appellant's counsel was that having found that Choong was not a fictitious character, the trial judge had failed to make a finding of fact as to who was the actual trafficker. There was no merit in this argument. What was important was for the trial judge to make a finding, which he did, whether on the facts before him, the prosecution had proven that the appellant was guilty of the offence of trafficking for which he was charged. In law, there was no such thing as 'actual trafficker' or 'not actual trafficker'. A trafficker was a trafficker. The

question to be asked was whether the appellant was proven to be one. The learned trial judge had found him so. He did not have to use the word 'actual'. The trial judge was right in not making a finding as to whether Choong was an 'actual trafficker' or not because Choong was not charged and no evidence was led against him by the prosecution (see p 121A–D).

(2) The learned judge had found that the appellant's statement did not raise any reasonable doubt in his mind as there were so many aspects that were unexplained, which he discussed in great detail. The learned judge then made a definite finding 'that the first accused did have in his custody and under his control the basin which contained heroin being cooked and that he knew that it was heroin'. It was very clear from the judgment that even after considering the defence of the appellant, the learned judge had no doubt that the appellant had the custody and control of the heroin contained in the basin on the stove and also that he knew it was heroin. That was a definite finding that the learned judge made. On the facts, it could not be said that the trial judge was wrong (see p 122A–B).

(3) As for the heroin found in the other part of the premises, after analyzing the evidence, and concluding as the trial judge did concerning the heroin in the basin on the stove, he concluded that the appellant also had knowledge of and custody and control of the rest of the heroin found in the apartment. Again, on the facts, it could not be said that the trial judge was wrong (see p 122C–D).

(4) Accordingly, there was no error of law or facts, miscarriage of justice or any valid reason for this court to interfere with the decision of the learned trial judge (see p 122D–E).

[Bahasa Malaysia summary

Pada 30 Jun 1990, Insp Perumal a/l Alagan, yang bertindak atas maklumat yang diterima, telah mengetuai satu pasukan polis dalam suatu serbuan ke atas sebuah pangsapuri di Pulau Pinang ('Pangsapuri tersebut'). Ketika pasukan polis sampai di pintu masuk pangsapuri tersebut, Insp Perumal dapati pintu jerjak kepada pangsapuri tersebut tertutup tetapi tidak berkunci. Walau bagaimanapun, pintu papannya berkunci. Beliau selepas itu mengetuk pintu papan tersebut dan berteriak berulang-ulang, 'Polis! Polis! Buka pintu!' tetapi tiada siapa membuka pintu tersebut. Tiba-tiba, beliau terdengar bunyi barang-barang dipindahkan dalam pangsapuri tersebut maka beliau pun menendang pintu tersebut hingga berlubang dan beliau dapat memasuki pangsapuri tersebut dengan menyeluk tangan ke dalam lubang tersebut dan membuka pintu itu dari dalam. Insp Perumal dan pasukan polis tersebut telah kemudiannya menyerbuk masuk ke dalam pangsapuri tersebut dan ternampak dua

orang lelaki Cina sedang berdiri, tertuduh pertama ('perayu') di ruang tamu dan adiknya ('tertuduh kedua') di ruang dapur. Kedua-dua tertuduh hanya berpakai dalam sahaja. Beliau dapati terdapatnya serbuk putih dan berwarna jingga terdapat pada hujung jari-jari mereka dan di kaki mereka. Mereka kelihatan terkejut dan pucat. Dua besin yang mengandungi serbuk berwarna jingga terdapat di dapur. Satu lagi besin yang mengandungi serbuk berwarna jingga terletak di atas dapur menyala di ruang balkoni. Selepas memperkenalkan diri beliau sebagai seorang pegawai polis kepada kedua-dua tertuduh dan memberitahu mereka bahawa beliau hendak menahan mereka kerana mensyaki mereka memproses dadah, Insp Perumal dan pasukan polis tersebut telah menjalankan penggeledahan akan pangsapuri tersebut. Setelah disoal-siat dan sebelum penggeledahan tersebut, perayu telah membawa Insp Perumal kepada tandas yang hanya satu-satunya di dalam pangsapuri tersebut di mana beliau telah menunjukkan tangki air di dalam tandas tersebut. Inspektor Perumal ternampak sebuah beg plastik yang menonjol keluar di atas tangki air tersebut. Beliau membawanya turun dan mendapati empat keping blok mampat bahan putih di dalamnya. Penggeledahan seterusnya menghasilkan terjumpanya tiga paket yang disyaki dadah heroin yang tersimpan di sebuah baldi di bilik ketiga pangsapuri tersebut. Inspektor Perumal juga terjumpa daripada laci sebuah tempat pemujaan di ruang tamu enam keping paket kecil yang disyaki dadah heroin di dalam sebuah beg plastik yang lain. Kandungan dari tiga besin tersebut, beg plastik yang dijumpai dari atas tangki air dan paket-paket lain yang dirampas, setelah dianalisa, didapati mengandungi dadah heroin. Kapas yang digunakan untuk mengesat tangan dan kaki kedua-dua tertuduh juga mendedahkan, setelah dianalisa, tanda-tanda dadah heroin. Tanda-tanda dadah heroin juga terdapat pada seluar dalam mereka. Sampel-sampel serbuk yang dikumpulkan daripada lantai dapur dan balkoni juga menunjukkan kehadiran dadah heroin dan kafein . Dadah heroin yang terdapat dalam pangsapuri tersebut seberat 1,689.68g. Perayu telah dituduh bersama tertuduh kedua di bawah s 39B(1)(a) dan boleh dijatuhkan hukuman di bawah s 39B(2) Akta Dadah Berbahaya 1952 ('Akta tersebut'). Pada penutupan kes pihak pendakwaan, hakim perbicaraan yang bijaksana telah meminda pertuduhan tersebut kepada tuduhan di bawah ss 12(2) dan (3) dan boleh dijatuhkan hukuman di bawah s 39A(2) Akta tersebut. Kedua-dua mereka mengaku bersalah. Perayu tersebut telah disabitkan dan dikenakan hukuman penjara selama 12 tahun dan sepuluh sebatan rotan. Tertuduh kedua telah dijatuhkan hukuman penjara selama sembilan tahun dan sepuluh sebatan rotan. Pihak Pendakwa Raya telah merayu atas tuduhan tersebut ('rayuan pertama'). Mahkamah Rayuan telah membenarkan rayuan pertama dan mengarahkan bahawa kedua-dua tertuduh dipanggil untuk memasukkan pembelaan mereka atas tuduhan terpinda yang asal. Kedua-dua tertuduh telah merayu kepada Mahkamah Persekutuan. Mahkamah Persekutuan telah menolak rayuan-rayuan mereka. Kemudiannya, hakim mahkamah

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rayuan telah meneruskah perbicaraan tersebut dan telah mendengar pembelaan kedua-dua tertuduh. Dalam pembelaan beliau di perbicaraan yang diteruskan, perayu telah memberi pernyataan tidak bersumpah daripada kandang tertuduh yang mana telah dicatatkan secara bertulis. Ia adalah merupakan penegasan perayu bahawa beliau telah pergi ke pangsapuri tersebut untuk mengutip ansuran-ansuran pinjaman wang secara haram atas suruhan majikan beliau, seorang bernama Tan Bak Huat ('Tan'). Dalam bulan September 1989, Tan telah memberi pinjaman sebanyak RM20,000 kepada seorang bernama Choong Hock Chuan ('Choong'). Pada 30 Jun 1990 lebih kurang jam 4.30 petang, perayu telah pergi ke pangsapuri tersebut untuk mengutip hutang yang kena dibayar daripada Choong. Menurut perayu tersebut, ketika beliau tiba di pangsapuri tersebut paja jam lebih kurang 5.30 petang, beliau dapati pintu terkunci dan tingkap bertutup. Beliau memanggil nama Choong beberapa kali tetapi tiada jawapan. Beliau kemudiannya menggunakan kunci pendua beliau untuk membuka pintu tersebut dan mendapati Choong berada di ruang tamu pangsapuri tersebut. Perayu kemudiannya menanya Choong mengenai hutang beliau kepada Tan dan Choong memberitahu beliau bahawa dia hanya boleh membayar sebahagian daripadanya. Choong juga memberitahu perayu bahawa beliau akan hanya ke bawah untuk mengambil baki duit tersebut dan memberitahunya supaya menunggu di dalam pangsapuri tersebut. Perayu memberitahu Choong bahawa beliau akan menyimpan kunci Choong sehingga beliau pulang dan jika belia gagal untuk membuat bayaran balik, perayu akan menyerahkan kunci tersebut kepada tuan punya pangsapuri tersebut. Sebelum beredar, Choong telah memberitahu beliau bahawa terdapat sebuah periuk di ruang dapur yang sedang dijerang di atas dapur dan meminta perayu supaya mengacaunya sehingga beliau kembali. Perayu bersetuju. Lebih kurang sepuluh minit kemudian, perayu telah menanggalkan pakaian beliau dan meletaknya di di bilik kedua kerana beliau berasa panas dan melekit. Sejurus kemudian, tertuduh kedua datang ke pangsapuri tersebut dan memberitahu beliau supaya kembali kerana bapa mereka tidak sihat. Perayu memberitahu tertuduh kedua supaya tunggu sebentar kerana beliau sedang menunggu Choong membayar wang yang terhutang itu. Suasana di dalam pangsapuri tersebut terlalu panas, tertuduh kedua juga menanggalkan pakaiannya dan meletakkannya di ruang tamu dan terus ke dapur untuk bersama perayu. Selepas beberapa minit, perayu meminta diri untuk pergi ke tandas dan menyuruh tertuduh kedua supaya mengacau kandungan besin tersebut dengan sudip kayu yang telah beliau guna. Sekembali daripada tandas, perayu mengambilalih mengacau kandungan di dalam besin tersebut daripada tertuduh kedua. Tidak lama kemudian, perayu terdengar ketukan kuat di pintu masuk. Ketika beliau menuju ke pintu depan untuk membukanya, dia mendapati pintu itu dipecahkan dan kelihatan tangan dimasukkan untuk membuka pintu tersebut dari dalam. Pada waktu polis memasuki pangsapuri tersebut

beliau berada di ruang tamu sementara tertuduh kedua berada di ruang dapur. Perayu menafikan telah menunjukkan apa-apa kepada polis dan menyatakan bahawa barang-barang yang dijumpai dalam bilik mandi telah dijumpai oleh polis atas usaha mereka sendiri. Perayu menyatakan bahawa beliau tidak tahu-menahu mengenai barang-barang yang terdapat dalam pangsapuri tersebut dan bahawa beliau tidak pernah terlibat dengan aktiviti-aktiviti yang berkaitan dengan dadah berbahaya atau pun mengedarnya. Hakim perbicaraan yang bijaksana telah memutuskan bahawa pernyataan perayu daripada kandang pesalah telah tidak berjaya membangkitkan sebarang keraguan yang wajar dalam kes pihak pendakwaan. Hakim perbicaraan yang bijaksana telah menyatakan bahawa perayu mungkin bersekongkol dengan Choong dalam mengedar dadah heroin yang terdapat dalam pangsapuri tersebut tetapi tidak mengurangkan kesalahan beliau atau melepaskan beliau daripada tanggungan. Hakim perbicaraan mendapati perayu mempunyai dalam jagaan dan kawalan beliau besin yang mengandungi dadah heroin tersebut yang sedang dimasak dan bahawa beliau mengetahui bahawa ia adalah heroin dan bahawa ia adalah hanya wajar untuk memutuskan bahawa beliau juga mengetahui mengenai dan mempunyai jagaan dan kawalan ke atas heroin yang selebihnya yang terdapat di dalam pangsapuri tersebut kerana kebiasaan beliau dengan pangsapuri tersebut hinggakan menanggalkan pakaian beliau dan hanya memakai pakaian dalam sahaja demi untuk keselesaan diri. Oleh yang demikian, hakim perbicaraan telah memutuskan bahawa perayu adalah dianggap mempunyai milikan keseluruhan dadah heroin tersebut yang terdapat di dalam pangsapuri itu. Sehubungan itu, hakim perbicaraan yang bijaksana telah membebaskan dan melepas tertuduh kedua tetapi mendapati perayu bersalah atas tuduhan asal yang terpinda dan menjatuhkan hukuman mati ke atas beliau. Ini telah dirayu oleh perayu terhadap sabitan beliau.

Diputuskan, menolak rayuan perayu dan mengesahkan sabitan dan hukuman:

(1) Hujahan yang dibangkitkan oleh peguam perayu adalah bahawa setelah mendapati bahawa Choong bukannya merupakan watak rekaan, hakim perbicaraan telah gagal untuk membuat satu keputusan fakta berhubung dengan siapakah pengedar sebenar. Tidak terdapat merit dalam hujahan ini. Apa yang penting adalah untuk hakim perbicaraan membuat keputusan, yang mana telah beliau lakukan, sama ada atas fakta yang terdapat di hadapan beliau, pihak pendakwaan telah membuktikan bahawa perayu bersalah kerana mengedar bagi yang mana beliau telah dituduh. Di sisi undang-undang, tidak terdapat perkara seperti 'actual trafficker' atau 'not actual trafficker'. Seorang pengedar adalah sesungguhnya pengedar. Persoalan yang harus ditanya adalah sama ada perayu telah dibuktikan sebagai seorang

pengedar. Hakim perbicaraan yang bijaksana telah mendapati bahawa beliau adalah seorang pengedar. Beliau tidak perlu menggunakan perkara 'actual'. Hakim perbicaraan telah bertindak dengan betul dalam tidak membuat keputusan berhubung dengan sama ada Choong merupakan seorang 'actual trafficker' atau pun bukan kerana Choong tidak dituduh dan tiada keterangan diberikan terhadap beliau oleh pihak pendakwaan (lihat ms 121A–D).

(2) Hakim yang bijaksana telah mendapati bahawa pernyataan perayu tidak membangkitkan sebarang keraguan yang wajar di dalam pemikiran beliau kerana terdapat banyak aspek yang tidak diterangkan, yang mana beliau telah secara bersungguh-sungguh membincangkannya. Hakim yang bijaksana kemudiannya membuat keputusan yang pasti 'that the first accused did have in his custody and under his control the basin which contained heroin being cooked and that he knew that it was heroin'. Adalah amat jelas daripada penghakiman tersebut bahawa meskipun selepas mempertimbangkan pembelaan perayu tersebut, hakim yang bijaksana tidak berasa ragu-ragu lagi bahawa perayu mempunyai penjagaan dan kawalan dadah heroin yang terkandung dalam besin di atas dapur tersebut dan juga bahawa beliau mengetahui bahawa ia adalah dadah heroin. Itu adalah keputusan mutlak yang telah dibuat oleh hakim yang bijaksana. Atas fakta-fakta tersebut, tidak boleh diperkatakan bahawa hakim perbicaraan tersebut telah tersalah dalam pertimbangannya (lihat ms 122A–B).

(3) Berhubung dengan dadah heroin yang terdapat di lain-lain bahagian pangsapuri tersebut, selepas menganalisa keterangan tersebut, dan memutuskan seperti mana yang dilakukan hakim perbicaraan berhubung dengan heroin di dalam besin di atas dapur tersebut, beliau telah memutuskan bahawa perayu juga mengetahui mengenai dan mempunyai penjagaan dan kawalan heroin selebihnya yang terdapat di dalam pangsapuri tersebut. Sekali lagi, berdasarkan fakta-fakta, adalah tidak boleh diperkatakan bahawa hakim perbicaraan telah membuat tindakan secara salah (lihat ms 122C–D).

(4) Sehubungan itu, tidak terdapat kesilapan di sisi undang-undang atau fakta, salah laksana keadilan atau sebarang alasan yang sah untuk mahkamah ini mengganggui keputusan hakim perbicaraan yang bijaksana tersebut (lihat ms 122D–E).]

[*Editorial Note*: The appellant has appealed to the Federal Court vide Criminal Appeal No P05–33 of 2001.]

Notes

For cases on appeal against conviction and sentence, see 5 *Mallal's Digest* (4th Ed, 2001 Reissue) paras 221–231.

Legislation referred to

Dangerous Drugs Act 1952 ss 12(2), (3), 37(d), 37(da)(i), 39A(2), 39B(1)(a), 39B(2)

Karpal Singh (*Karpal Singh & Co*) for the appellant.

Dato' Abdul Gani Patail (*Jagdeep Singh* with him) (Public Prosecutors, Attorney Generals Chambers) for the respondent.

Abdul Hamid Mohamad JCA (delivering judgment of the court): The appellant was the first accused in the High Court. He was charged with the second accused under s 39B(1)(a) and punishable under s 39B(2) of the Dangerous Drugs Act 1952 ('the Act'). At the close of the prosecution's case, the learned trial judge amended the charge to one under ss 12(2) and (3) and punishable under s 39A(2) of the Act. Both of them pleaded guilty. The appellant was convicted and sentenced to 12 years imprisonment and ten strokes of the rotan, the sentence of imprisonment to run from the date of arrest. The second accused was sentenced to nine years imprisonment and ten strokes of the rotan, the sentence of imprisonment also to run from the date of arrest.

The public prosecutor appealed against that decisions (the first appeal). The Court of Appeal allowed the public prosecutor's appeal and directed that both the accused be called upon to enter upon their defence on the original amended charge. Both the accused appealed to the Federal Court. The Federal Court subsequently dismissed their appeals.

Subsequently, the learned trial judge continued the trial and heard the defence of both the accused. The learned judge acquitted and discharged the second accused but found the appellant guilty of the original amended charged and sentenced him to death.

In this appeal (the second appeal), we are only concerned with the appeal by the appellant, the first accused.

The facts that had been adduced by the prosecution during the prosecution's case had been aptly summarized by the learned trial judge in his first grounds of judgment, which we now reproduce:

> At about 6pm on 30 June 1990, Inspector Perumal a/l Alagan of the Cawangan Anti-Dadah, Bukit Aman, Kuala Lumpur, acting on information received, led a party of police officers in a raid upon an apartment, No 45–11–11, located at Green Lane Heights, Jalan Besi, Penang. When the police party arrived at the entrance to the apartment, Inspector Perumal found the outer metal grilled door to the apartment closed but not locked. The glass louvres of the front window of the apartment were closed shut. He gently pulled open the metal grilled door and attempted to open the wooden door to the apartment immediately behind the metal grilled door. However, he found it locked. He thereupon rapped on the wooden door and shouted repeatedly, 'Polis! Polis! Buka pintu!' but to no avail as no one came forward to open it. All of a sudden he heard the sound of things being moved inside the apartment whereupon he managed to kick open a hole in the door and gain entry into the apartment by reaching through the hole and unlocking the door from inside.

A Inspector Perumal and the police party then rushed into the apartment and saw two male Chinese standing there, one in the living area [identified as the first accused] and another in the kitchen area [identified as the second accused]. He shouted. 'Polis! Jangan bergerak!' Both the accused were clad only in their underwear. He noticed white powder and orange coloring on the tips of their fingers and on their feet. They looked shocked and pale. Inspector B Perumal saw in the kitchen area two light-green basins containing orange-colored powder in loose form.

He then went to the back of the apartment where there was a balcony. He saw a yellow-colored basin containing orange-colored powder. The basin was on a lighted gas stove. He ran and turned off the flame.

After identifying himself as a police officer to the two accused persons and C informing them that he was arresting them on suspicion of processing drugs, Inspector Perumal and the police party carried cut a search of the apartment.

Upon interrogation and prior to the search, the first accused led Inspector Perumal to the only toilet in the apartment where he pointed upwards with his mouth [he was already handcuffed at the time] to the water tank in the toilet. Inspector Perumal saw a white and light orange-colored plastic bag protruding D over the top of the tank. He took down the plastic bag [a 'GAMA' supermarket bag] and found inside four compressed blocks of a white substance, each wrapped separately in plastic and brown paper.

A search resulted in the recovery of three packets of suspected heroin kept in a pail in the third room of the apartment. Inspector Perumal also recovered from a drawer of an altar in the living area six small packets of suspected E heroin inside a 'Fashion 20' plastic bag.

Besides the above items which were seized, Inspector Perumal also found and seized various other items as detailed in the search list exh p 37. The contents of the three basins, the plastic bag recovered from on top of the tank of the water-closet and the other packets seized were, upon analysis, found to contain heroin. Swabs taken of the hands and feet of the two accused persons F also revealed, upon analysis, traces of heroin. Traces of heroin were also found on their underwear. Samples of powder gathered from the floor of the kitchen and the balcony also showed the presence of heroin and caffeine.

The sum total of the suspected drug found in the apartment formed the subject-matter of the charge against the two accused persons of trafficking in 1.689.68g of heroin and thereby having committed an offence under G s 39B(l)(a) of the Dangerous Drugs Act 1952 and punishable under s 39B(2) of the Act.

In his defence at the continued trial after the first appeal, the appellant gave an unsworn statement from the dock which was put in writing and marked as exh D74. His statement had also been summarized by the learned trial H judge, and we now reproduce:

... In essence, it was his contention that he had gone to the apartment to collect overdue instalments on an illegal money lending transaction at the behest of his employer, one Tan Bak Huat ['Tan'].

To explain his presence in the apartm6nt at the time of the police raid, the first accused gave a lengthy background statement. He said that Tan was a I loan-shark for whom he worked as a debt-collector and that he received 8% of the amount of loans recovered as his commission in ordinary cases and 10% in problem cases. In September 1989, Tan had made a loan RM20,000 to one

Choong Hock Chuan ['Choong'] , an illegal bookmaker or 'bookie' who operated from the Penang Turf Club, at a monthly interest rate of 20%. The first accused said he received 8% of every collection made from Choong. A

During the first three months there were no problems with Choong's loan, but in January 1990 Tan told the first accused to look for Choong at the Penang Turf Club, which he did. Choong then told him that he was facing financial difficulties and would discuss his problem with Tan. At the end of February 1990, Tan told the first accused that Choong was again giving problems and asked the first accused to collect the interest due from Choong. The first accused then met Choong at the Turf Club on 3 March 1990 whereupon Choong told him he was facing financial difficulties and asked for a week's grace to pay up. B

On 7 March 1990, Tan summoned the first accused to his house where Choong was already present. Choong then put forth a proposal to overcome his financial difficulties by carrying out illegal gaming activities and told them that he had found a suitable place for that purpose. However, he was encountering problems with the police and, after some discussion, Choong and Tan proposed that the first accused sign the tenancy agreement to rent the place to carry out illegal gaming activities as he, the first accused, had no problems with the police. Choong also gave an assurance that, after the tenancy agreement was signed, he would repay RM12,000 which was then outstanding. As both Choong and Tan gave an undertaking that they would settle any fines that the first accused would have to pay and that they would also assume responsibility for all problems which arose, the first accused, after initial hesitation, was persuaded to accept the proposal as he also required the money for his father's medical treatment. C D E

On 7 March 1990, Choong took the first accused from his house to an office where two persons, a man and a woman, were present. On Choong's instructions, he signed the tenancy agreement and handed it over to Choong whereupon Choong gave him RM1,000 to pay to the woman. Choong also signed the tenancy agreement. The first accused said that he did not understand the contents of the document he signed as it was not in Chinese. F

He then asked Choong about the repayment which he had promised. Choong then asked him to follow him to the apartment where Choong paid him RM12,000 which was the outstanding instalment.

While still at the apartment, the first accused said that the woman had come to check the particulars of his identity card and, being satisfied therewith, had gone back. He said that, because of the frequent problems he found collecting overdue instalments from Choong, he made a duplicate set of keys to the apartment and returned the original set to Choong the same day. After that, he never made any payments towards the rental of the apartment and did not have any connection with the apartment. G

On 30 June 1990 at about 4.30pm he received a telephone call from Tan as a result of which he went to Tan's house. Tan told him that Choong was in arrears of instalments for two months. As a result of this he proceeded to the apartment at No 46–11–11 Green Lane Heights, Jalan Besi, Penang. Prior to leaving his house, he had informed the second accused as well as members of his family to contact him at the said address if there were any problems in relation to his father, because the latter was ill at that time. H I

When he arrived at the apartment at about 5.30pm, he found the door locked and the windows closed. He called out Choong's name a number of times but

there was no reply. He then used his duplicate set of keys to unlock the door and found Choong in the living area of the apartment and waling towards him while holding some keys.

He then asked Choong about his debt to Tan and Choong told him that he could only repay RM3,000 whereas the balance was RM8,000. Choong also told the first accused that he would only go downstairs to collect the balance of the money and told him to wait awhile in the apartment. The first accused told Choong that he would keep Choong's keys to the apartment until his return and if he failed to make repayment, he, the first accused, would then surrender the keys to the owner of the apartment. Before going out, Choong gave him RM3,000 Choong also told the first accused that he would only be away for a short while to collect the balance of the money. Before leaving, Choong told him that there was a pot ['periuk'] in the kitchen on the stove and asked the first accused to help stir the contents until he returned. The first accused agreed. Choong told the first accused to lock the apartment because he had gambling implements in the third room. Choong was wearing shorts at the time and went into the third room to change into a pair of trousers before leaving. The first accused noticed that Choong's hands were covered with powder.

The first accused went to the kitchen and saw a basin on the stove and proceeded to stir the contents with a wooden spoon. After about ten minutes he felt sticky and hot as the air was full of dust. Because of this he removed his clothing and kept them in the second room. When he came out of the second room, he heard knocking the door. He used Choong's set of keys to open the door and saw the second accused who told him that their father was ill and their mother wanted him to return home. The first accused said he kept two sets of keys to the apartment in his shirt in the second room. One set was hi s and the other was Choong's.

He then told the second accused to enter the apartment and lock the door. He told him to wait awhile as he was waiting for his friend to bring money which was owed. The first accused then told the second accused to lock the door while he went to the back. As he was in his underwear only, the first accused told the second accused to keep the set of keys to the apartment with him.

As it was very hot inside the apartment, the second accused took off his shirt and placed it in the living area and went into the kitchen to be with the first accused. After a few minutes, the first accused excused himself to go to the toilet and asked the second accused to stir the contents of the basin with the wooden spoon that he had used. On returning from the toilet, the first accused took over the stirring of the contents of the basin from the second accused.

The second accused then told him that he was feeling hot and sticky and that he wanted to take a bath, whereupon the first accused told him that there was a towel in the second room. The second accused then went to the second room, took off his clothes, took the towel and headed towards the bathroom. Before that the first accused had grown tired of waiting for Choong and had made up his mind that after the second accused had his bath they would return home because their father was sick. He felt that Choong had deceived him and that he could not wait any longer. As soon as the second accused had entered the bathroom and hung the towel up but before he could close the door of the bathroom, they both heard kicking and loud knocking at the front door of the apartment. The first accused was startled momentarily and as he was heading towards the door to open it, he found it being broken and a hand

being inserted to unlock it. At the time when the police entered the apartment he was in the living area while the second accused was in the area of the kitchen in front of the bathroom. A

The police proceeded to search the apartment after which they asked him several questions to which his answer was that he did not know, in the Hokkien dialect. The first accused was then directed to go to the bathroom to carry out a search. He denied having pointed out anything with his mouth and stated that the things that were found in the bathroom were discovered by the police on their own. B

After a complete search of the apartment, he and the second accused were taken to their house for a search, after which they were taken to the police station.

The first accused stated that he had no knowledge of the things found in the apartment and that he was never involved in any activity pertaining to dangerous drugs or trafficking in them. The second accused, his younger brother, had been in the apartment only for a short while, for about five or ten minutes, before the police raid and the second accused would not know anything about Choong or the things that were found in the apartment. C D

The learned trial judge then analyzed the evidence of the appellant at length and concluded:

I therefore find that the statement of the first accused from the dock has not succeeded in raising any reasonable doubt in my mind in the case for the prosecution. There are so many aspects in it which are unexplained, as stated earlier in this judgment. His actions cannot be accepted as those of a reasonable man in the circumstances. E

I have considered the case for the prosecution and juxtaposed it against that of the defence and taking them together as a whole, I find that the first accused had not succeeded in raising a reasonable doubt in my mind as to his guilt. It may well be that he was in cahoots with Choong Hock Chuan in trafficking in the heroin found in the apartment but that does not detract from his guilt or absolve him from liability, in the criminal sense of that term. F

Having regard to the definition of trafficking in s 2 of the Act and the presumptions in paragraphs (d) and (da)(i) of s 37 of the Act, a large quantity of heroin, as well as paraphernalia related to the preparation and packing of heroin, found in different parts of the apartment and the admission of the first accused that he did stir for some length of time the contents of the basin cooking on the stove in the apartment, I find that the first accused did have in his custody and under his control the basin which contained the heroin being cooked and that he knew that it was heroin. It is therefore only reasonable to conclude that he also had knowledge of and custody and control over the rest of the heroin found in the apartment because of his familiarity with the apartment in knowing that gambling implements were kept in the third room [although told this by Choong], in knowing that a towel was kept in the second room and to the extent of stripping himself to his underwear in order to be comfortable. Otherwise, he would have risked being surprised by visitors or occupants of the apartment besides Choong as Choong purportedly rented the apartment to carry out illegal gaming activities there. *Ergo*, he is deemed to have been in possession of all the heroin found in the apartment. His defence has not been able to raise any reasonable doubt in my mind as to this. G H I

> I have considered the submissions of the prosecution and the defence at the close of the prosecution case as well as at the close of the defence and considered them as a whole in arriving at my decision.

Before us Mr Karpal Singh, learned counsel for the appellant argued, firstly, that the learned trial judge having found that Choong Hock Chuan was not a fictitious character had failed to make a finding of facts as to who was the 'actual trafficker'. He submitted that the learned trial judge must make a specific finding whether the appellant or Choong or both were traffickers. The learned counsel did not refer us to any authority for the proposition. With respect, in our view there is no merit in that argument. What is important was for the learned trial judge to make a finding, which he did, whether on the facts before him, the prosecution had proved that the appellant was guilty of the offence of trafficking for which he was charged. In law, there is no such thing as 'actual trafficker' or 'not actual trafficker'. A trafficker is a trafficker. The question is, whether the appellant was proved to be one. The learned trial judge had found him so. He did not have to use the word 'actual'. Neither need he make a finding whether Choong was an 'actual trafficker' or not. Indeed, we do not think it is right for the learned trial judge to do so. Choong was not charged. No evidence was led against him by the prosecution. His name only appeared in the appellant's defence. Indeed it would be wrong for the learned judge to make a finding of guilt (that is what it really amounts to) of a person not charged and against whom no evidence was adduced by the prosecution.

Secondly, it was argued that the learned judge did not amend the charge. He referred us to p 219 and p 1 of the appeal record.

Page 1 contains the 'pertuduhan pindaan' dated 2 August 1994 tendered by the prosecution. At p 219, the record reads:

> Court delivers written judgment
>
> First accused is found guilty and convicted on original amended charge dated 2 August 1994.

It is very clear that that was the 'original amended charge'. It was under that charge that this court in the first appeal directed that the appellant be called upon to enter upon his defence. It was under that charge that the subsequent continued trial proceeded. It was under that charge that the appellant was found guilty and convicted.

With respect, this ground too has no merits.

The third ground argued by the learned counsel for the appellant was that the learned trial judge had failed to consider that the presumptions under s 37(d) and (da) are separate and that the test for the rebuttal of the presumptions are separate tests. He further argued that it was wrong for the learned trial judge to find that the appellant had control and custody of the drugs found in the other parts of the premises. Accessibility was not conclusive, he argued as Choong had the key to the premises too.

We have to look at the defence put up by the appellant, by way of an unsworn statement from the dock which was prepared before hand and tendered as an exh D74, the content of which we have reproduced earlier.

We have also reproduced the learned judge's analysis of the defence and his conclusion thereon. The learned judge found that the statement of the appellant did not raise any reasonable doubt in his mind as there were so many aspects that were unexplained, which he discussed in great detail. The learned judge then made a definite finding 'that the first accused did have in his custody and under his control the basin which contained heroin being cooked and that he knew that it was heroin'.

It is very clear from the judgment that even after considering the defence of the appellant, the learned judge had no doubt that the appellant had the custody and control of the heroin contained in the basin on the stove and also that he knew it was heroin. That is a definite finding that the learned judge made. On the facts, we do not see how it can be said that he was wrong.

Regarding the heroin found in the other part of the premises, after analyzing the evidence, and concluding as he did concerning the heroin in the basin on the stove, he concluded that the appellant also had knowledge of and custody and control of the rest of the heroin found in the apartment. We do not wish to repeat the reasons given by him, which we have already reproduced. That disposes the defence of the appellant on the heroin found in other parts of the premises. Again, on the facts, we do not see how the learned judge can be said to be wrong.

In conclusion, we do not find any error of law or facts, any miscarriage of justice or any valid reason for us to interfere with the decision of the learned judge. We therefore dismissed the appeal and confirmed the conviction and sentence.

Appellant's appeal dismissed and conviction and sentence confirmed.

Reported by Lim Lee Na